89-557

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of Louisiana

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the imposition of a desegregation remedy that restructures Louisiana's higher education system, abolishes its constitutionally authorized governance boards, creates a comprehensive community college system, establishes a hierarchical tiering system for universities, and imposes new college admission standards, among other drastic measures, unnecessarily and improperly involved the district court in higher educational policy choices;

2. Whether the district court's power to fashion a remedy below was limited by the consent decree previously entered into by the parties, and/or by the remedial standards for higher education desegregation prescribed by the U.S. Department of Education under Title VI of the 1964 Civil Rights Act;

3. Whether the racial identifiability of a State's higher educational institutions and governance boards is a sufficient basis for finding a violation of the Fourteenth Amendment or of Title VI, when the State has long ago abandoned its laws requiring racial separation in its colleges and has instituted good faith non-discriminatory hiring and admission policies and practices, and whether, in any event, the United States may raise such a Fourteenth Amendment claim; and

4. Whether the district court's rulings on the findings of the Special Master in this cause, and the district court's failure to hold hearings on Consent Decree compliance or on the merger of the Southern University Law Center into the Louisiana State University Law Center violated Due Process requirements and Federal Rules of Civil Procedure 52 and 65(d).

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IN THE

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Appellant,

v.

UNITED STATES OF AMERICA,
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On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of Louisiana

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JURISDICTIONAL STATEMENT

The Board of Supervisors of Southern University and A&M College, the appellant, appeals from the final judgment of a Three-Judge District Court entered in separate decisions:

(1) Its Order and Reasons of August 2, 1988, which held that the State of Louisiana and other defendants maintained a dual system of public higher education in violation of Title VI of the 1964 Civil Rights Act, 42 U.S.C.A. § 2000d (1981);

(2) Its Opinion and Order of July 19, 1989, which held, *inter alia*, that the system's dualism also violated the Fourteenth Amendment to the United States Constitution and which imposed a remedy; and

(3) Its Supplemental Reasons and Order of August 4, 1989, denying motions for a new trial and for a stay of

the court's prior judgment and imposing additional remedies.

OPINIONS BELOW

The August 2, 1988, judgment of the three-judge district court, which appears in the appendix hereto, p. 3a, *infra*, is reported at 692 F. Supp. 642 (E.D. La. 1988).

The July 19, 1989 and August 4, 1989, judgments are not reported and are reprinted in the appendix hereto, pp. 39a and 78a, respectively.

The final recommendations of the Special Master appointed in the proceedings below by the three-judge panel, upon which the court's judgment in part depends, is also unreported, but appears in the appendix, p. 623a, *infra*.

JURISDICTION

The final order of the three-judge court constituting the judgment herein was entered on August 4, 1989, following the district court's consideration and denial of appellant's post-trial motions.

A notice of appeal to this Court was timely filed in the United States District Court for the Eastern District of Louisiana on August 10, 1989.

This appeal is being docketed within sixty (60) days of the filing of the notice of appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253. These and other statutes, rules and constitutional provisions relied upon are set forth in the appendix hereto.

HOW THE FEDERAL QUESTION WAS RAISED

The federal question was raised in the complaint of the United States, filed March 14, 1974, and amended on November 17, 1980. This action was brought pursuant to the Fourteenth Amendment to the United States Constitution; Sections 601 and 602 of the Civil Rights Act of 1964, 42 U.S.C.A. 2000d, 2000d-1, and regulations issued

thereunder, 45 C.F.R. Part 80, pp. 115a and 887a, *infra* and jurisdiction was claimed under 28 U.S.C.A. 1345. The complaint alleged, *inter alia*, that the

> . . . (A)cts and practices of the defendants and their agents maintain and perpetuate an unlawful dual system of higher education based upon race, and thereby deprive black students attending state-supported schools, and prospective black students, of equal protection of the laws and equal educational opportunities in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of Title VI of the Civil Rights Act of 1964 and the regulations issued pursuant thereto.

Further, the United States prayed that the ". . . (C)ourt enter an order enjoining the defendants, their agents, officers, employees, successors, and all persons in active concert with them from maintaining and perpetuating racial dualism in the State-supported system of higher education within the State of Louisiana."

On the same date on which the original complaint was filed, the United States filed a request for a three-judge Court, under 28 U.S.C.A. §§ 2281, 2284, and Rule 12 of the United States District Court for the Middle District of Louisiana, *infra*, appendix, p. 184a. And, on March 28, 1974, an order was entered by the Chief Judge of the Fifth Circuit Court of Appeals constituting a court of three judges to hear the case, which three-judge court has been reconstituted four times since, on April 16, 1974, on November 7, 1979, on November 16, 1979, and on November 26, 1979.

In its judgment of August 2, 1988, the district court noted that a three-judge court had been properly requested and convened, p. 10a, *infra*, and ruled that the United States had standing to bring the action under Title VI, and that the twenty institutions under the four higher education boards were continuing to be operated under an unlawful, dual system of education, in violation of Title VI. Additionally, in its opinion of July 19, 1989, the

court stated that the ". . . present scheme for governing education in Louisiana—three operating boards and one coordinating board—has perpetuated illegal segregation in Louisiana's higher education . . ." and that the ". . . system of multiple boards is therefore a defect in the State's system of higher education that violates the federal constitution." Further, the court held that statistics regarding student performance ". . . demonstrate additional particular constitutional defects inherent in and perpetuated by Louisiana's present system of higher education," appendix hereto, p. 45a.

STATEMENT OF THE CASE

More than twenty years ago, on January 13, 1969, a letter was sent from the Department of Health, Education, and Welfare to the State of Louisiana, advising that Louisiana operated its system of higher education in violation of Title VI of the Civil Rights Act of 1964. This message was repeated in letters dated October 21, 1969, May 21, 1973, November 10, 1973 and November 30, 1973. Louisiana responded that its system complied with federal law. The facts set forth in these letters and the response of the State of Louisiana are the acorn from which this giant oak of a case sprouted. Through the years, like the oak from the acorn, it has grown into something quite different from its beginnings. Louisiana has changed—in particular its laws on race relations and the enfranchisement of its black citizens—and so have many of the facts giving rise to this case. The court below, and now this Court, then, are put to judge allegations now twenty years old against present day facts.

The appellant, Board of Supervisors of Southern University and Agricultural and Mechanical College, is one of three higher education management boards established by the Louisiana State Constitution of 1974, Article 8, §§ 5-7. The State Constitution also provides, in Article 8, § 5 thereof, for a coordinating or policy board, the Louisiana Board of Regents. The Constitution containing

these provisions was proposed by a bi-racial Constitutional Convention, adopted by the people of Louisiana on April 20, 1974, and cleared by the U. S. Department of Justice as comporting with the 1965 Voting Rights Act. When the people selected the multi-board higher education governance structure, they consciously chose between alternative propositions on the referendum ballot—Proposition A, for a multi-board structure; and Proposition B, for a single board, appendix hereto, p. 914a, *infra*. So adopted, the Constitution of 1974 replaced the 1921 Constitution, and became effective at midnight on December 31, 1974.

To implement its new constitutionally-mandated higher education system, the Louisiana Legislature, in an extraordinary session held in 1974, and a regular session in 1975, enacted extensive and new enabling statutes. L.S.A.-R.S. Title 17:3121-3133 and Title 17:3201-3383, appendix hereto, pp. 126a-143a and 1048a and 1067a. These statutes and other laws tied to the constitutional governance board structure became effective at various times beginning January 1, 1975.

The foregoing constitutional provisions and laws authorize the Louisiana State University (LSU) system; the State Colleges and Universities system; and the Southern University system. The Southern University system presently consists of four institutions of higher learning: (1) Southern University and Agricultural and Mechanical College at Baton Rouge; (2) Southern University at Shreveport; (3) Southern University at New Orleans; and (4) the Southern University Law Center. L.S.A.-R.S. Title 17:3216 placed the Southern University system under the authority of the Southern University Board of Supervisors. And, L.S.A.-R.S. Title 17:3335 empowered appellant and each other management board to operate as a body corporate and, within certain limited exceptions, to exercise "all power to direct, control, supervise and manage the institutions under its control," appendix hereto, pp. 126a-127a.

More than 13,000 students are currently enrolled at the institutions of the Southern University system. Each institution in the Southern system is predominantly black. The Southern University Board is predominantly black. Every other public higher education governance board in Louisiana is predominantly white. Grambling State University, governed by the Board of Trustees, is also majority black. The productive capacity of Southern and Grambling in graduating black baccalaureate degree holders in Louisiana has been singularly impressive: fifty-nine percent of the State's total number of baccalaureate degrees granted to blacks in 1985 were granted by Southern and Grambling. In 1986, that figure was sixty-two percent. National studies have ranked Southern University and A&M College in the top ten of institutions producing black college graduates in the nation, appendix hereto, pp. 947a and 1087a.

However, none of the referenced constitutional provisions or laws require any particular racial make-up of any of the State's governance boards, nor of any of its colleges.[1] The records of the Constitutional Convention disclose no racial motivation for the adoption of the Constitution of 1974, and, in particular, its higher education articles. Indeed, a black legislator proposed the creation of the Southern University Board, appendix, p. 857a, *infra*.

The Louisiana Constitution of 1974 manifests a clear break with Louisiana's segregative past. It outlaws all forms of racial discrimination in Louisiana, including in higher education. The preamble to Article 8 of the Louisiana Constitution of 1974 proclaims: "The goal of the public educational system is to provide learning en-

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[1] The State's present governor has appointed twenty-nine persons to the State's governance boards since his term of office began in March of 1988. In each case, he appointed a white person to replace a departing white and a black to replace a departing black. The racial make-up of the boards is a product of an exercise of executive discretion.

vironments and experiences, at all stages of human development, that are humane, just and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop his full potential."

Indeed, the State repealed its remaining laws requiring separate educational facilities for blacks and whites at various legislative sessions between 1972 and 1975.

Through Louisiana's new educational governance structure, as provided for in the Louisiana Constitution of 1974, each of the State's undergraduate colleges, except Louisiana State University and A&M College, is an open admissions institution. Thus, any student who graduates from a Louisiana high school is guaranteed admission to the college of his or her choice, whether the graduate is black or white. The State's graduate schools have modest selective admission standards. None of the State's governance boards created in the 1974 Constitution, particularly Southern's Board, has ever adopted any official policy or practice of denying admission to any student because of the student's race. No institution now governed by appellant has ever had any such policy at any time, however. No evidence was presented at trial to show any present-day policy or practice on the part of the State, or any governance board, or any State college, of denying any person admission to any State institution of higher learning because of that person's race. And new laws adopted by the State legislature, particularly the "Taylor Plan" legislation, guarantee a free college education to students meeting certain academic requirements regardless of race, appendix hereto, p. 144a.

The United States commenced this action on March 14, 1974, prior to the adoption of the State's present Constitution. It alleged a racially dual system of higher education in Louisiana. The United States purported to bring suit under Title VI of the 1964 Civil Rights Act as well as the Fourteenth Amendment.

The complaint was amended on November 17, 1980, to substitute defendants, and it was at this time that appel-

lant and the other governance boards created by the 1974 Constitution became parties. The defendants below, including Southern, denied liability.[2] No allegation was ever made in the initial or amended complaint that the laws authorizing the governance boards were unconstitutional or a vestige of *de jure* segregation.

On September 8, 1981, the parties settled the suit and signed a Consent Decree, appendix hereto, p. 199a. The Consent Decree was on that date entered as a judgment, following a hearing before the district court at which the court determined that the Decree was ". . . consistent with the objectives of the Fourteenth Amendment and Title VI. . .," appendix hereto, p. 200a. (See also appendix pp. 262a and 266a).

The Consent Decree provided, *inter alia*, for affirmative steps to recruit other-race students and faculty, establishing goals and timetables; for measures to reduce attrition and require developmental education; for other-race faculty fellowship programs; and for scholarships for black students pursuing medicine, law, and veterinary science at historically white institutions; for cooperative efforts between proximate, historically white and black institutions; and for the enhancement of predominantly

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[2] The parties participating in the proceedings below not listed in caption are:

(1) STATE OF LOUISIANA, Defendant Below

(2) BOARD OF TRUSTEES OF STATE COLLEGES AND UNIVERSITIES, Defendant Below

(3) BOARD OF TRUSTEES OF STATE COLLEGES AND UNIVERSITIES, Defendant Below

(4) BOARD OF SUPERVISORS OF LOUISIANA–STATE UNIVERSITY AND A&M COLLEGE, Defendant Below

(5) GRAMBLING STATE ALUMNI ASSOCIATION, Litigating Amicus

(6) LOUISIANA BOARD OF REGENTS, Defendant Below

(7) ST. BERNARD PARISH SCHOOL BOARD, Defendant Below

(8) BOSSIER PARISH SCHOOL BOARD, Defendant Below

(9) LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION, Defendant Below

black institutions, through strengthening existing academic programs, locating new high-demand, high-cost academic programs, and improving physical facilities. It provided for monitoring progress under the Decree and for reporting to the court. With respect to governance, it left the boards intact, and provided that the Regents, Trustees, and LSU Boards be desegregated to "approximately reflect the racial composition of the State's population," but that the Southern Board would "reflect the racial composition of the State's population inversely." The Southern Board's present make-up complies with this requirement.

Part III of the Consent Decree, headed "Effect of Decree" stated that it ". . . resolves all issues in contention between plaintiff and defendants in this lawsuit relating to compliance with and enforcement of the Fourteenth Amendment and Title VI." Further, Part III states in paragraph B: "The defendants' compliance with this Decree, or any modification thereof, as between the parties, shall be deemed compliance with the Fourteenth Amendment and Title VI as to all matters addressed hereunder this Decree." Appendix hereto, p. 234a.

The court retained jurisdiction to assure implementation of the Consent Decree. The court's jurisdiction, however, ended and the Consent Decree terminated on December 31, 1987, unless, the plaintiff or another party by motion "requests this Court to conduct a hearing for the purpose of determining whether the defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis." Appendix hereto, p. 235a.

On December 29, 1987, the plaintiff, the United States, filed the contemplated motion, contending that the Consent Decree had not been effectively implemented, and requesting a hearing at which such determination could be made, appendix, p. 267a, *infra*. On December 31, 1987, appellant joined in appellee's motion, p. 560a, *infra*. Yet, the court never held a hearing on these motions.

In refusing to do so, the court relied upon Part IV, Paragraph E of the decree, which states:

> Should this court determine at the time of the hearing that any provision of the Consent Decree has not been effectively implemented or that the defendants are not operating the system of public higher education in a manner consistent with the goals and objectives of this Decree, this court shall enter such orders as are necessary to provide additional or further relief as is appropriate and shall retain jurisdiction until such implementation has been accomplished. Appendix hereto, p. 236a.

The court read the words of Paragraph E "to provide additional or further relief as is appropriate" to mean that "this Court may find that the decree has failed in its purpose and thus may craft a remedy as if no decree had ever been made." 692 F.Supp. at 649, appendix hereto, p. 15a.

Finally, the Consent Decree established a compliance standard. It required the parties to make a "good faith" effort to achieve and implement its goals and commitments. Appendix hereto, p. 237a. The goals of the Decree were "not to be construed as quotas and therefore the failure to achieve any goal" would "not in itself constitute non-compliance" with the Decree. Appendix hereto, p. 237a. Parties were also permitted, where required actions were not feasible, to pursue reasonable alternatives, or, in some cases, to move for relief from the obligation. Appendix hereto, p. 237a. An Addendum to the Consent Decree and an Amendment to the Addendum were adopted by the court in September of 1982 and May of 1983, containing substantially the provisions of the principal Decree, but applying to the Shreveport, Louisiana area institutions.

Instead of determining compliance with the Consent Decree, the court, in a Minute Entry of March 30, 1988, directed the parties to file summary judgment motions on the issue of whether a racially dual system existed

in Louisiana. At the court's direction, motions for summary judgment were filed by the United States, the Board of Regents, and by the Bossier Parish School Board.

On August 2, 1988, the motion of the United States was granted and the defendants held liable for violation of Title VI. While not deciding upon a remedy, the court suggested one, then warned in its opinion that "a drastic change" might be required to remedy the remaining vestiges of the former *de jure* segregated system, i.e., the racial identifiability of the State's colleges and boards, appendix, p. 3a at 35a. The district court's suggested remedy strongly resembled political proposals offered by the State's governor, but rejected by the state legislature, appendix, pp. 834a-853a. The governor offered these proposals, not for desegregation purposes, but rather, for "reform purposes," appendix, pp. 1001a-1022a.

On October 19, 1988, appellant filed a motion for an evidentiary hearing and reurged its demand for a determination of Consent Decree compliance, appendix, p. 569a. The district court denied the motion and required the parties to fashion a remedy acceptable to the court, appendix, pp. 577a and 579a.

The parties tried unsuccessfully to reach accord on a voluntary remedial plan. Thereafter, on December 2, 1988, the court appointed a Special Master to develop a plan. The Special Master entered his "Recommended Remedial Plan" on April 18, 1989. On May 30, 1989, the Special Master submitted to the court his "Final Report" embodying his suggested remedy to desegregate Louisiana's higher education system, which remedy tracked that suggested by the court in its August 2 Opinion.

Appellant and other parties below, particularly appellee herein, filed extensive objections to the Special Master's initial and final recommendations. Appendix hereto, pp. 582a-617a and 721a-733a. Nonetheless, the district court issued a judgment on July 19, 1989, adopting most of the recommendations of the Special Master.

As presaged by the court, the remedy it ordered was drastic indeed. For the first time, the court declared Louisiana's governance structure and its higher education system unconstitutional, based on the Fourteenth Amendment. It required that within thirty days of the entry of its order "the four boards currently governing public higher education in Louisiana shall be disbanded and their powers consolidated into a single State governing board." The court gave this new board "ultimate authority over academic, budgetary, personnel and administrative affairs of each public institution currently overseen by the Board of Trustees, the Southern Supervisors, and the LSU Supervisors." Appendix hereto, p. 63a. The court also gave the board the special mission of monitoring and implementing the court's remedial plan and of insuring progress toward eliminating Louisiana's racially dual system.

The court set the size of this judicially created board at seventeen members, plus one non-voting student member; fixed the term of office of its members; established the appointing authority; provided for staggered terms; set certain qualifications for board members; reserved to itself the right to appoint members to the board, under certain circumstances, and, in any event, to veto its composition or any appointee thereto; empowered the board to appoint a president and an interim president to run the system and called for a substantial administrative staff whose qualifications it also set; and mandated advisory boards for each college, appendix hereto, pp. 63a-66a. In setting up the board, the court rejected a finding of the Special Master that a specific racial makeup of the board, seven black members out of seventeen, was necessary to protect the interests of historically black colleges and black students. Appendix hereto, p. 53a.

The district court structured the State's colleges into a hierarchical tier, establishing a flagship/research university, several doctoral and graduate program institutions, and comprehensive institutions. With respect to

each tier, the court prescribed selective or open admission standards. For the new selective institutions, the court provided for a rule of ten percent admissions exceptions for other-race students, principally because of its concern for the negative effect selective admissions might have on black students. Indeed, the court decreed an end to the traditional system of open admissions to all State universities, in effect, limiting present student choice and set deadlines for the adoption of new admission standards. It also limited the availability of remedial education programs in the State's four-year colleges, which programs principally assist in the college education of black students. Appendix hereto, pp. 56a, 67a and 71a.

The district court also ordered the establishment of a new comprehensive community college system, beginning with the State's four existing two-year institutions, and its vocational schools, and then expanding into other areas of the State with the creation of new community colleges. It set the requirement for the system's administrative head and for his qualifications and mandated admission standards.[3] Appendix hereto pp. 70a-71a.

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[3] These remedies are less than obvious desegregation tools. Mr. Justice Holmes has stated in another context, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 507 (1921). Here, literally volumes of history show the irrelevance of the district court's remedies to desegregation. For instance, Florida has had a single governance board since 1905 (Florida Statutes, Title 16, Section 240.205; Florida State Constitution, Article 9, Section 1); Georgia, since 1931 (Georgia State Constitution, Article 8, § 4); and Mississippi, since 1910 (Mississippi Statutes, 37-101-3, et seq.; Mississippi Constitution, Article 8, § 2134, et seq.) Yet each was charged by HEW and/or the U.S. Department of Justice with Title VI violations, as was Louisiana, a multi-board state. What these states historically had in common was not their governance structures, but their official policies and practices of racial discrimination. No state has ever adopted a single governance structure as a desegregation remedy, nor selective admissions, nor a community college system; and the United States did not seek nor support this remedy here. Compare *Milliken v. Bradley*, 433 U.S. 289, 297, 97 S.Ct. 2749, 2757-2758 (1977) (Milliken II) (requiring remedies to be related to desegregation).

Although the Southern University Law Center is admittedly integrated—with a student body that is 58 percent black and 42 percent white, and a faculty that is 50 percent black and 50 percent white—the court ordered its elimination and merger into the LSU Law Center, where less than one percent of the student body is black. The court justified this order on the grounds that: (1) the merger would eliminate program duplication, a claimed impediment to desegregation, and (2) the percentage of Southern graduates who passed the state bar examination on their first attempt demonstrated that Southern's was an "inferior law school," producing "a secondary class of lawyers unable to compete fully in the professional context." No evidence was adduced at trial to support these conclusions or this merger. No notice or opportunity for a hearing was given to the parties of the court's intention in this regard. The Special Master specifically recommended against merger of the law centers or any other institutions.

The court ordered funding to improve the quality of the State's predominantly black universities, but only "whenever fiscally possible", a standard left undefined. And it required its newly created board to develop a program of "financial incentives" for institutions meeting or exceeding board-established desegregation goals, and "reverse incentives or taxes" for those consistently failing to meet their goals. Appendix hereto, p. 75a.

The court established a monitoring committee to evaluate the progress of the new board and of each institution toward "specific compliance" with its Order. The court also appointed members to the specific monitoring board, including a Dr. Paul Murrill, a former Chancellor of LSU and A&M College. The court cloaked the monitoring committee with authority to recommend appointees to the governance board in certain cases. The court ordered that if the governance board did not "achieve substantial progress toward eliminating the racial identifiability of Louisiana's universities" within five years, then the moni-

toring committee was mandated "to recommend to the court more direct solutions, including court appointment of board members or direct control by the committee of the system of higher education and merger of institutions." Neither the term "substantial progress" nor "racial identifiability" were defined in this context. However, the court retained "continuing jurisdiction to take appropriate action" to enforce its Order. Appendix hereto, pp. 76a and 77a.

On July 31, 1989, appellant, the Grambling State University Alumni Association, and appellee filed post-trial motions variously for a new trial, to amend or alter judgment, or to have the court's judgment reconsidered, appendix hereto, pp. 734a, 779a, and 785a. Additionally, appellant filed a motion to stay the district court's judgment. On August 2, 1989, the State of Louisiana, through its Attorney General, joined in appellant's motions. On August 4, the district court denied the motion to stay, and issued a "Supplemental Order," granting in part and denying in part the post-trial motions of the several parties in an effort "to obviate any ambiguity or uncertainty" contained in its Judgment of July 19, 1989. Its August 4 Order provided measures to desegregate institutional staffs and administrators. It ordered the State's four governance boards to "cease operation . . . no later than thirty (30) days from entry of the court's Order of July 19"; and limited the period of the effect of its Order to December 1994, appendix hereto, pp. 105a-108a.

On August 18, 1989, this Court granted appellant's and the State of Louisiana's applications for a stay of the enforcement of the district court's judgment in this matter pending the timely docketing of this appeal and the final disposition of this case, appendix hereto, p. 2a.

THE QUESTIONS ARE SUBSTANTIAL

The appropriate standards for crafting a desegregation remedy in the context of a higher education case, brought under the Fourteenth Amendment and Title VI, presents

a novel and substantial question. It has never been addressed by this Court.

Appellant asserts that the controlling remedial standards are embodied in the Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658 (February 15, 1978). The Criteria were promulgated by the then Department of Health, Education and Welfare (HEW), and are now administered by the Department of Education. Thus, they represent the agency's interpretation of Title VI compliance standards, as Congress has specifically required the agency to interpret the laws its administers. The agency's interpretation of this law is a duty reposed to the agency by Congress and is binding upon courts, according to recent Supreme Court cases. *NLRB v. United Food and Commercial Workers Union, Local 23, AFL-CIO*, —— U.S. ——, 108 S. Ct. 426 (1987); *Young v. Community Nutrition Institute*, 476 U.S. 974, 106 S.Ct. 2360 (1986); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 100 S.Ct. 790 (1980); *Batterton v. Francis*, 432 U.S. 416, 425-26, 97 S.Ct. 2399 (1977). *See also Adams v. Bell*, 711 F.2d 161, 165 n.28, 29 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1065, 104 S.Ct. 1272 (1984); *Adams v. Califano*, 430 F. Supp. 118 (D.D.C. 1977) (Order, 430 F. Supp. at 121). *See also Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified and aff'd per curiam*, 480 F.2d 1159, 1164-1167 (D.C. Cir. 1973).

Similarly, in *Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir. 1965), the Fifth Circuit ordered the district court to apply HEW Criteria developed for elementary and secondary schools. The appeals court recognized that, in enacting Title VI and in requiring such promulgations, Congress intended a uniform national policy in desegregation cases, and enforcement of that policy by a national agency under nationally

applicable guidelines. *See also United States v. Jefferson County Bd. of Ed.*, 372 F.2d 836 (5th Cir. 1966) *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 386 U.S. 1001 (1967); *Price v. Denison Indepedent School District Bd. of Ed.*, 348 F.2d 1010, 1015 (5th Cir. 1965); K. Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Statutory Constructions*, 30 Ariz. L. Rev. 769, 770, 800 (1988).

In the instant case, the district court held that the Criteria applied "only during the voluntary compliance period" and were "not intended to be applied by courts adjudicating Title VI violations," appendix, p. 85a. Thus, it refused to accord the Criteria any weight whatsoever.

This Court should decide whether there will be uniform national legal standards regarding higher education desegregation remedies, or ad hoc district by district court articulation of such standards to enforce Title VI. Uniform enforcement of the Equal Protection Clause throughout the United States is one of the chief benefits of Title VI. Therefore, Title VI compliance requirements should not differ from state to state nor should they differ depending upon whether compliance is voluntary or not.

The district court's remedy strikes down provisions of Louisiana's Constitution of 1974 and the numerous State laws that implemented them; eliminates a productive, historically black professional school; and re-writes, as would a legislature, broad new chapters of higher education law for the State. In contrast, the Criteria provide a far less intrusive remedy.

Even without reference to the court's disregard of the Criteria, the sweeping remedial scheme it fashioned was overly broad, presenting a substantial federal question. The district court was required to narrowly tailor its remedy to fit the violation of rights involved. It would be justified in striking Louisiana's laws as unconstitutional only where it was necessary to do so to cure the violation. The

least intrustive remedy was required to be employed. *City of Richmond v. J. A. Crossen Company*, —— U.S. ——, 109 S. Ct. 706 (1989); *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 99 S.Ct. 2766 (1978); *Milliken v. Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 3127 (1974) (Milliken I); *Whitcomb v. Chavis*, 403 U.S. 124, 160-161, 91 S.Ct. 1858, 1877-78 (1971); *Swann v. Charlotte Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276 (1971); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 434 (1976); and *Rizzo v. Goode*, 423 U.S. 362, 377 (1976); *Columbus Bd. of Ed. v. Penick*, 439 U.S. 1348, 1353, 99 S.Ct. 24, 26-27 (1978). *See also Sixty-Seven Minnesota State Senate v. Beens*, 406 U.S. 187, 92 S.Ct. 1477 (1972) (A federal reapportionment court should accommodate the relief ordered to the appropriate provisions of State statutes relating to the legislature's size as far as possible; drastically changing the size of the State senate and the size of the house of representatives of the legislature is not required by the federal Constitution and is not justified as an exercise of federal power). *Cf.* Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 49 (1982). This is particularly true in education cases, where the Supreme Court has shown increasing reluctance to allow federal courts to trench on the prerogatives of State and local educational institutions, but instead leaves public education, insofar as constitutionally possible, under the control of state and local authorities. *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226, 106 S.Ct. 507, 513 (1985); *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 465 (1979); *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 90 (1978); *Keyes v. School District No. 1 Denver, Colo.*, 413 U.S. 189, 213 (1973); *Alabama State Teachers Association (ASTA) v. Alabama Public School and College Authority*, 289 F. Supp. 784, 788 (M.D. Ala. 1968) (Three-Judge Court), *aff'd per curiam, without written opinion*, 393 U.S. 400, 89 S. Ct. 68 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

In the instant case, the district court could have attacked the offending "racial identifiability" it found in the governance boards by specific orders requiring a given racial make-up, and specific orders respecting attracting other-race faculty and students, leaving to state authorities the details of bringing the state into compliance, if a valid constitutional violation were found. *Ruiz v. Estelle*, 650 F.2d 555 (5th Cir. 1981), *cert. denied*, 460 U.S. 1042 (1983). Thus, there is no geometric fit between the remedy of a single board or the other restructuring ordered and the claimed violation of racially identifiable boards and institutions.

Speculation by the Special Master, later adopted by the court, that under a single board funds would be "freed up . . . presumably to aid in the desegregation process"; that it is "sensible that efficient decisions [of a single board] might aid in desegregation"; and that while the "improvement" in desegregation in Florida under a single board is a "predictive" . . . "but by no means implausible" judgment for Louisiana, is too weak a support to dismantle a system of governance, admissions, and organization adopted fourteen years ago, subsequent to the *de jure* segregative actions of the State. Appendix hereto, p. 658a.

Application of the Criteria or the prevailing jurisprudence to this case would not have required or permitted the elimination of the Southern University Law School. The Criteria declare a "unique role" for "traditionally black colleges." They command that historically "white and black institutions are to function as part of a unitary system free of the vestiges of state-imposed racial segregation" appendix hereto, pp. 871a, 873a. To disestablish the dual structure, the Criteria require a given State or agency to "specify steps to be taken to strengthen the role of traditionally black institutions in the state system."[4] As a desegregation goal, the Criteria seek more

[4] As to the unique role of historically black colleges in the education of the historical victims of discrimination, see Brief of

and better-trained minority group doctors, lawyers, engineers, and other professionals.

The court-ordered merger jeopardizes Southern's proven capacity to produce qualified black lawyers in return for the uncertain prospect of a judicially perceived greater quality institution. Besides, the court's reasoning is a *non sequitur*. Law graduates who do not pass the bar do not become attorneys. If bar passage is the standard of quality, then, can Southern law graduates who pass the bar be denominated a secondary class? Must they not be presumed equal in competence to other lawyers who pass the bar? Are they not, therefore, fully able to compete in the professional context? To condemn those Southern graduates who become attorneys simply because they graduated from Southern is to ask, as Nathaniel did of Philip respecting Jesus Christ; "Can anything good come out of Nazareth?"—an unfounded and unreasonable

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Amicus, National Association for Equal Opportunity in Higher Education, filed and referenced in *Adams v. Richardson*, 480 F.2d 1159, 1164-1165 (D.C. Cir. 1973), appendix, pp. 975a-984a. The brief argues, *inter alia*, that equal educational attainment—achieving college degrees—not just equal access, is a goal of Title VI and the Fourteenth Amendment. See also "Statement by the National Association for Equal Opportunity in Higher Education," appendix, pp. 976a, 985a-987a.

In *Adams*, the court stated:

> The problem of integrating higher education must be dealt with on a state-wide rather than a school-by-school basis. Perhaps the most serious problem in the area is the lack of statewide planning to provide more and better trained minority group doctors, lawyers, engineers and other professionals. A predicate for minority access to quality post graduate programs is a viable, coordinated statewide higher education policy that takes into account the special problems of minority students and of black colleges. As Amicus points out, these black institutions currently fulfill a crucial need and will continue to play an important role in black higher education.

question, then and now.[5] The Criteria suggest that improving the quality of the already desegregated historically black law school, if indeed necessary, would more effectively assist black citizens to overcome the effects of *de jure* segregation, one of which is a paucity of black lawyers.[6]

The Southern Law Center was *sua sponte* ordered closed without a hearing and without regard to proper legal standards, in violation of the procedural and substantive due process rights of appellant and of the law center's faculty and students. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 2532 (1985); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Cf. Dartmouth College v. Woodward*, 4 Wheat 512 (1819). "Audi alteram partem—hear the other side!—a demand made insistently through the centuries, is now a command spoken with the voice of the Due Process Clause." *Caritativo v. California*, 357 U.S. 549, 558 (1958) (Frankfurter, J., dissenting). *Earl v. McVeigh*, 91 U.S. 503, 510 (1876). This is a principle of universal obligation. See also Baier, *Framing and Reviewing a Desegregation Decree: Of the Chancellor's Foot and Fifth Circuit Control*, 47 La. L. Rev. 123, 138 (1986).

The district court's finding of a constitutional infirmity because the State maintains in the same city two

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[5] See John 1:46

> "And Nathaniel said to him, can anything good come out of Nazareth? Philip said to him, come and see."

Only a court that indulges the notion espoused by certain parties to this cause that a predominantly black law center is necessarily inferior could, on the basis of such a fleeting glimpse at the Southern Law Center as the court below had in this case, confirm its inferiority. As with Philip, the district court was required to "come and see" in the form of a hearing and supporting record, to avoid making, as here, an uniformed judgment.

[6] Virtually all of Southern's law graduates pass the bar exam, although not on the first attempt, appendix, p. 860a.

law schools with different admission standards and different orientations is not supported on the record, and is an impermissible tampering with the State's valid educational choices.[7]

The Criteria also recognize, and the Special Master specifically found below, that the enhancement of predominantly black institutions (PBIs) is an essential ingredient of a plan to desegregate higher education. In the light of a clear record, the Special Master ordered that a percentage of the State's operating and capital budgets be set aside each year to enhance PBIs. Under Rule 52 of the Federal Rules of Civil Procedure, this finding should have been implemented by the court since it was not "clearly erroneous." This reasoning also applies to the Special Master's finding that merger of the Southern Law Center into the LSU Law Center was not justified on the record. *See Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199 (6th Cir. 1984); *NLRB v. Southwestern Bell Telephone Co.*, 730 F.2d 166, 168 (5th Cir. 1984); *See also Criteria*, I(B), appendix hereto, p. 875a. The vague and unclear order of the court to provide enhancement funding whenever fiscally possible, violates both the specificity requirements of Fed. R. Civ. P. 65(d), and the well-stated rule that a State's fiscal posture may not be taken into account in fashioning a desegregation remedy. *See, Liddell v. Missouri*, 731 F.2d 1294, 1320 (8th Cir. 1984), *cert. denied*, 469 U.S. 816,

[7] Indeed, the record argues otherwise. Two distinguished law school deans, Peter Hay, Associate Dean of the University of Illinois School of Law, and Charles Meyers, Dean of Standford Law School, visited Louisiana law schools, including Southern University Law Center, and rendered a report to the State Board of Regents on legal education in Louisiana. This Report was attached to Chancellor B. K. Agnihotri's witness statement submitted to the Special Master which was before the district court. See appendix, *infra*, pp. 1030a-1038a. These distinguished legal educators concluded that: "[I]t is essential for the well-being of all the people of Louisiana, not just the blacks, for Southern University Law School to remain in existence and to grow in size and strength." Appendix, *infra* pp. 1044a-1045a and 1047a.

105 S.Ct. 82 (1984); *Atiyeh v. Capps*, 449 U.S. 1312, 101 S.Ct. 829 (1981); and *Williams v. Edwards*, 547 F.2d 1206, 1213 (5th Cir. 1977), presenting other substantial federal questions. Further, the district court's failure to specifically limit the term of its continuing jurisdiction, and the basis on which it is empowered to act to fashion new or additional remedies; as well as the failure to define the terms "substantial progress" and "racial identifiability," also violate Fed. R. Civ. P. 65(d).

Similarly, the court below condemned the Consent Decree—the parties' voluntary settlement of their dispute, and their voluntary acceptance of a remedy—without a hearing, even though a hearing was mandated by the Consent Decree itself. The court simply eye-balled the racial make-up of the colleges and boards—a test not permitted by the terms of the Decree—and concluded that the Decree had not and could not work, appendix hereto, pp. 34a-35a. It also made unsubstantiated and incorrect findings related to Consent Decree implementation, appendix hereto, pp. 35a, 572a-573a. The remedy imposed by the district court's judgment was thus unnecessary, overriding the existing final judgment on remedy already entered in the case. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 590-591, 104 S.Ct. 2576, 2594-2595 (1984); *United States v. Swift & Co.*, 286 U.S. 106, 115-117, 52 S.Ct. 460, 462-463 (1932).

The Decree operated as a judgment, whether a predicate violation of Title VI or the Fourteenth Amendment existed, or whether its remedies were broader than legally required. *Local Number 93, International Association of Firefighters v. City of Cleveland*, 54 U.S.L.W. 5005, 5009-5010 (U.S. July 2, 1986). Since the scope of a consent decree must be discerned within its four corners, the district court clearly exceeded its jurisdiction when it considered the question of liability under Title VI and the Fourteenth Amendment, and when it fashioned an entirely new remedy. *United States v. Armour & Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 1757 (1971); *United States*

v. Atlantic Refining Co., 360 U.S. 19, 23, 79 S.Ct. 944, 946 (1959); and *Hughes v. United States*, 342 U.S. 353, 72 S.Ct. 306 (1952).

The district court's strained reasoning that it had authority under the cited language of the Consent Decree to "provide additional or further relief as appropriate," disregards the obvious requirement that such a determination must be made "at the time of the hearing" on Consent Decree compliance, pp. 12a-13a, *supra*, a hearing that was never held. Even then, the Consent Decree allows "additional or further relief as appropriate" only to the extent necessary to insure its effective implementation.

No party argued, as the district court suggests, that merely signing the Consent Decree rendered the State's system unitary, appendix hereto, p. 15a. But since the Decree had been entered as a judgment consistent with Title VI and the Fourteenth Amendment, a determination of compliance or not with its provisions was necessarily the same as determining whether the system was unitary. The court's assertion that it could not enforce Consent Decree-required remedies at a hearing held after the December 31, 1987 termination date of the Decree, even though the enforcement process of requesting a hearing began prior to the termination date, is nonsensical. Appendix, pp. 15a-16a. Its reliance on *United States v. Overton*, 834 F.2d 1171, 1174, 1176 (5th Cir. 1987), is erroneous. In *Overton*, the parties' Consent Decree (or stipulated agreement), unlike in the instant case, had terminated before relief under it was sought. Understandably, the *Overton* court could not enforce a decree that had expired by its own terms. Here, the plaintiff's motion was timely filed, thus, in accordance with the express provisions of the Consent Decree, extending its life and making its remedies enforceable at a compliance hearing, appendix hereto, pp. 235a and 236a.

Although a final judgment, a consent decree must be construed as a contract for enforcement purposes. *United*

States v. ITT Continental Baking Co., 420 U.S. 223, 238, 95 S.Ct. 926, 935 (1975). Thus, the district court lacked the power to enter a new remedy, but could only enforce the Decree by its terms. By its clear provisions, the Consent Decree permitted the existence of both racially identifiable boards and institutions at the end of its term, as long as the parties discharged their obligations in good faith, pp. 202a and 237a, *supra*. The court's disregard of the Consent Decree thwarts a national policy favoring voluntary resolution of Title VI claims, and discourages settlement of desegregation cases—matters worthy of consideration by this Court.

Even if the court would apply the Criteria to voluntary compliance only, as the court below asserts, the Consent Decree obviously represents voluntary compliance by the parties. Therefore, the Criteria should have been applied to this case for this further reason.

Additionally, the court's requirements of selective admissions, of a community college system, of reverse incentives for institutions failing to meet desegregation goals, and of eliminating remedial education in senior colleges, place disproportionate burdens on black students and black institutions, in violation of the Criteria and relevant jurisprudence.[8] The Criteria declare that the

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[8] See *Adams v. Richardson*, 480 F. Supp. 118 (D.D.C. 1977), where the court stated:

> The process of desegregation must not place a greater burden on black institutions or black students' opportunity to receive a quality public higher education. The desegregation process should take into account the unequal status of black colleges, and the real danger that desegregation will diminish higher educational opportunities for Blacks. Without suggesting the answer to this complex problem, it is the responsibility of HEW to devise criteria for higher education desegregation plans which will take into account the unique importance of black colleges and at the same time comply with the congressional mandate. *Cf. Mayor and City Council of Baltimore v. Matthews*, 562 F.2d 914, 922 and n.7 (4th Cir. 1977); and *Mandel v. U.S. Dept. of HEW*, 411 F.Supp. 542 (D.C. Md. 1976).

"transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students, faculty or institutions or by reducing the educational opportunities currently available to blacks," appendix hereto, p. 837a. Selective admissions, particularly the unrestrained use of ACT scores which the district court permits, will unduly limit the number of black students attending college. Apparently recognizing this fact, the court ordered the institutions to reserve up to ten percent of admissions as "exceptions." But these exceptions themselves will introduce new burdens for black students, labeling them as second class students.

The requirement of incentives and reverse incentives to reward and to penalize institutions for progress in achieving desegregation goals overlooks the obvious fact that historically black colleges can be expected to make slower progress. The result will be that these schools, which need more resources to desegregate, will get less; and getting less they will be less successful in achieving integration. The court's threat of merger of racially identifiable colleges at the end of the five year term of the court's order is, therefore, an ominous one—portending the elimination of historically black colleges and their productive capacity. And, contrary to the district court's conclusion, community colleges in the State of Florida have increased burdens rather than opportunities for minority students in higher education, appendix hereto, pp. 916a-919a and 957a-974a.

In *ASTA*, *supra*, a three-judge court held that where a State has eliminated *de jure* racial segregation, as long as the State or its institutions deal with admissions, faculty and staff in good faith, it discharges its affirmative duty to dismantle the racially dual system on the college level. 289 F. Supp. at 790. The Supreme Court's *per curiam* affirmance in *ASTA*, 393 U.S. 400, 89 S.Ct. 681 (1969) was a decision on the merits necessarily deciding the *ASTA* holding and was, therefore, binding on the district court. *See Hopfmann v. Connolly*, 471 U.S. 459, 105 S.Ct.

2106 (1985); *Anderson v. Celebrezze*, 460 U.S. 780, 784, 103 S.Ct. 1564, 1568, n. 5 (1983); *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240 (1977). The district court declined to follow this precedent. *Cf. Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987) *appeal pending appeal docketed No. 88-4103* (5th Cir. argued May 1, 1989); *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289 (1975).

ASTA correctly recognizes that a State cannot assign students to colleges as it can assign them to elementary schools; a State, therefore, cannot be forced by a court judgment to do something it has no power to do. Hence, the relative degree of integration of its colleges, without more, does not determine whether the state has satisfied its affirmative duty to dismantle a dual system.

The Sixth Circuit in *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986) appears to reach a result opposite to that of *Ayers* and *ASTA*, but in erroneous reliance on the Supreme Court's summary affirmance in *Norris v. State Council of Higher Education for Va.*, 327 F.Supp. 1368 (E.D. Va. 1971), *aff'd per curiam sub. nom., Board of Visitors of the College of William & Mary in Virginia v. Norris*, 404 U.S. 907, 92 S.Ct. 227 (1971). The *Norris* court, unlike the court in *ASTA*, declined to "trace the perimeter of a state's obligation to dismantle all racial characteristics of a system of higher education that was initially segregated by law." *Norris'* holding, far from reaching this monumental question, held simply "that one agency of the state . . . cannot impede another agency of the state . . . in its efforts to fully integrate its student body." 327 F.Supp. at 1373. Thus, *Norris'* precedential value is limited to that simple holding. The court below misconstrued the *Norris* holding and incorrectly followed it.[9]

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[9] The hope expressed in *Green v. County School Board of New Kent County*, 391 U.S. 430, 432, 88 S.Ct. 1689 (1968), for no white or black elementary and secondary schools, "just schools," and the dictum in *Norris*, 1327 F. Supp. 1373 for "just colleges,"

Even if *ASTA* does not state the controlling law, as appellant believes, then *ASTA* and *Ayers*, on the one hand, and *Norris* and *Geier* on the other, present a conflict between lower courts and the circuits on this most substantial national issue.

Further, the actions that the State agreed to undertake and those that it did undertake under the Consent Decree must be deemed affirmative steps to dismantle the dual system, to the extent that such are demanded by the good faith requirement. The United States and appellant have argued below that incomparable physical facilities at PBIs indirectly exclude certain white students and affect their free choice, and disproportionately burden the choices of black students who choose to attend PBIs. Thus, a part of the good faith test, consistent with *ASTA*'s rule of unfettered student choice, is the removal of any impediments to such choice lingering from the dual system. A state may address this problem through added resources or other action designed to improve the integration and offerings of PBIs. The emphasis here is not on "separate, but equal", as the district court incorrectly observed, since no racial separation is legally required; it is rather on ending racial separation through enhancement, appendix hereto, p. 33a. Appellant believes this is a reasonable reading of *ASTA*'s good faith standard, or at the very least, can be en-

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do not necessarily argue that majority black public colleges offend the Constitution. Appellant's hope is that availing black and white students of equal access and opportunity in the settings of hisorically white and black colleges will permit colleges such as are managed by appellant to be recognized as "just colleges"—not predominantly black or formerly all black—within the letter and spirit of *Green, supra*.

Indeed, the Criteria commit States to the "goal of organizing and operating the system and institutions of higher education in a manner that promises realistically to overcome the effects of past discrimination and to disestablish the dual system, and *which assures that students will be attracted to each institution on the basis of educational programs and opportunities uninhibited by past practices of segregation.*" (Emphasis added.)

grafted upon the *ASTA* standard without derogating from it—presenting another important and unresolved federal question.[10]

The great weight of authority holds that the United States may not maintain a claim strictly under the Fourteenth Amendment. Yet, the district court permitted the United States to do so and struck down Louisiana's constitution and laws as violative of the Fourteenth Amendment, raising an additional substantial question. *United States v. State of Alabama*, 828 F.2d 1532, 1547 (11th Cir. 1987) (*per curiam*) (The United States conceded that it had no standing to raise the Fourteenth Amendment claim.), *cert. denied, sub. nom. Board of Trustees of Alabama State University v. Auburn*, —— U.S. ——, 108 S.Ct. 1857 (1988); *United States v. City of Philadelphia*, 644 F.2d 187 (3rd Cir. 1980); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977). Although this Court has not ruled directly on this issue, based on the uniform authority of the various circuits, only Title VI claims were before the district court. Whether appellee could raise Fourteenth Amendment claims is critical. The district court's expansive remedy is grounded in constitutional violations, testing the limits of its equitable powers. Title VI provides a more limited remedy, and the court could not strike Louisiana's laws as unconstitutional if appellee could not raise constitutional claims. A decision on Title VI grounds is distinct from an exercise in constitutional interpretation. *Regents of the University of California v. Bakke*, 438 U.S. 265, 281, 98 S.Ct.

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[10] For instance, just to bring the physical facilities of Grambling and Southern to a level of comparability with agreed upon historically white institutions, the State committed during the term of the Consent Decree to spend $79 million in capital outlay at Southern and $41 million at Grambling. However, it spent only $14 million at Southern and $16 million at Grambling in capital outlay funds during this period. These disparities and the failure to fund them are admitted on the record and must be dealt with in order to afford a truly free choice to students, appendix hereto, p. 364a.

2733, 2743 (1978). *Cf. U.S. v. State of Alabama*, 791 F.2d 1450, 1456 n. 6 (11th Cir. 1986). Thus, the district court's findings of unconstitutionality of Louisiana's laws is *ultra vires*.

Furthermore, the district court should have decided the case on statutory grounds or on the basis of the Criteria, and avoided the constitutional question. Under well-settled principles of judicial restraint articulated by this Court, it was required to do so. *Three Affiliated Tribes of Ft. Bertole Reservation v. Wold Engineering*, 467 U.S. 138, 104 S. Ct. 2267 (1984); *Regents of the University of California v. Bakke*, 438 U.S. 265, 281, 98 S.Ct. 2733, 2743 (1978); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 65 S.Ct. 152 (1944); and *Ashwander v. T.V.A.*, 297 U.S. 288, 347, 56 S.Ct. 466, 483 (1936).

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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